United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

ORIGINAL

75-2119

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA ex rel. DOLLREE MAPP and ALAN LYONS,

Petitioners-Appellants,

-against-

WARDEN, NEW YORK STATE CORRECTIONAL INSTITUTION FOR WOMEN, BEDFORD HILLS, NEW YORK; and WARDEN, GREAT MEADOW CORRECTIONAL FACILITY, COMSTOCK, NEW YORK,

Respondents-Appellees.

- X

On appeal from the United States District Court for the Eastern District of New York

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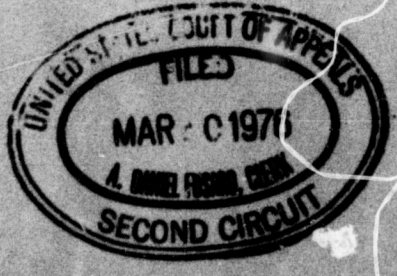
PETITION FOR REHEARING



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PETITION FOR REHEARING

Appellant Dollree Mapp petitions this Court for rehearing of the case decided by this Court on March 16, 1976 on the following grounds:

1) The Court has made a finding of fact contrary to the record in its statement on the issue of the reliability of the unknown informant who furnished the information on which the search warrant was based. The Court stated the parties agreed that the informant was merely untested not unreliable. There is no such agreement in the record nor any evidence in the record whatsoever on this issue.

2) On such erroneous statement of fact, the Court has predicated an argument in support of the validity of the

search warrant at variance with prior decisions of this Court, i.e. United States v. Sultan, 463 F.2d 1066 (1972) which in effect becomes a bootstrap argument validating the allegations of an unknown unreliable informant by the fact of after-found contraband.

3) The Court has disregarded petitioner's uncontraverted contentions that, assuming arguendo there was a constitutional basis for search of premises at North Conduit Avenue, there was never probable cause for the search for the Nashville Boulevard premises.

4) In its analysis of the record this Court has disregarded its own conclusion in United States v. McClean, #75-1269 decided January 13, 1976 where Judge Mansfield for the Court described the police unit to which all the arresting and testifying officers below belonged (S.I.U.) as a "sordid picture of police corruption, extortion and misconduct that appears to have permeated an important unit of the New York City Police Department."*

5) Appellant now requests leave to recast her argument in this Court concerning tainted identification evidence only generally referred to in Point I but argued on habeas corpus below.

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*Compare People v. Vasquez, 49 A.D.2d 590 (2nd Dept. 1975). The events testified to concerning Ms. Mapp occurred in 1970 -- a period when the S.I.U. is now estsblished to have been involved in illegal and corrupt activities in connection with its arrests. In Vasquez as well as in the case at bar there is a real issue as to whether the so-called informant existed at all.

ARGUMENT

This Court has predicated its holding of the validity of the affidavit in support of the search warrant in large part on the facts set forth in footnote 3:

> "3. The parties agree that the statement in ¶ A of the affidavit that the informant had 'not proven reliable in the past' should be construed to mean that the informant's reliability was untested, not that he had actually been untrustworthy on prior occasions."

The record is bare of any such concession or agreement. On page 17 of appellee's brief in a footnote, the State asserts:

> "The informant here was necessarily styled as 'unreliable' not because his information had proved to be irresponsible or untruthful in the past, but merely because his reliability was as yet untested."

This is the only reference anywhere to the appellee's contention that the informant was not really unreliable -- only "untested". It has not been the custom of this Court in the past to take unsupported statements of advocates for either side and construe them as an agreement of the parties. The Court's finding on this matter must, therefore, have been inadvertent and the error should be corrected. What follows thereafter is the bootstrap argument. Says the Court appropriately:

> "When an informant's tip is relied on to establish probable cause . . . cases require that the warrant application set forth the underlying circumstances upon which the informant based his conclusion and disclose facts which give assurance of the informant's reliability or credibility."

In this case the informant is expressly termed unreliable or "not proven reliable". Nonetheless this Court accepts

the unknown unreliable informant's statement that he spoke to Ms. Mapp (a statement not otherwise verified since Det. Sylvan Topel who listened in did not know whose voice he was hearing). The Court states:

> "The basis of the informant's belief here was information supplied by Mapp herself, a source which hardly could be faulted."

This case differs from United States v. Sultan, 463 F.2d 1066 (2 Cir. 1972). There the reliability of the informant was established by inferences which were drawn from the allegations of the affidavit that the unnamed informant had "previously supplied accurate information". It may be as stated in Sultan that an "untested" informant's story was corroborated by other facts that become known to the affiant even though they corroborated only innocent aspects of the story. This case is different: the informant was "not proven reliable in the past" -- not "untested".

The holding of this Court on this issue is further at variance with the recognition in Sultan that informants are more likely to lie in narcotics cases than in cases involving other common varieties of crime. Cf. Jaben v. United States, 381 U.S. 214 (1965). Similarly, if the informant had "not proven reliable in the past" this Court could not credit his description of appellants' operation as representing "familiarity" as set forth in footnote 2 of this Court.

The independent police investigation, moreover, at no time connects Ms. Mapp to narcotics. Trips between Nashville

Boulevard and North Conduit Avenue, the check of the telephone records and even the identification of Ms. Mapp's picture do not corroborate any connection of appellant to narcotics since no transactions were observed by anyone connecting Ms. Mapp. Moreover, there was only the informant's word that he was listening to her voice over the telephone; that alleged conversation was on November 6, 1969, three months prior to the application for the search warrant.

The testimony by Detective Bergerson concerning overheard remarks about the "bringing home" of the bags would seem insufficient to connect the unnamed Nashville Boulevard premises to the North Conduit premises. There was no evidence that appellant Lyons resided on Nashville Boulevard or that it was "home", or that in fact he ever brought narcotics to the Nashville Boulevard premises.

This Court's statement that

> "there is no evidence that Bergersen misrepresented what he was told"

is simply wrong. At the time this Court ruled (March 16, 1976), Bergerson had been established as a briber, perjurer and an otherwise unreliable member of the Special Investigation Unit (S.I.U.).* Appellant's brief pp. 9-10 set forth inconsistencies

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*Appellant's Reply Brief p. 8 asserts that personnel records of the Police Department were subpoenaed to the trial, but never turned over to defense counsel. Those records must reveal the results of an ongoing investigation of Detective Bergerson -- his deceit and illegal actions in other cases if not this one. They also must reveal similar information about the other officers, Sylvan Topel and Edward Wilson, both S.I.U. who took early retirement from the force under fire.

which raise the inference of untruth. This Court disregards those inferences. The "substantial allegations of criminal activity contained in the affidavit" should be scrutinized by this Court -- now aware of the history of fabrication by these very S.I.U. officers -- instead of applauded and endorsed as appears from this Court's opinion.

Finally, appellant requests a new review of this appeal based upon the tainted identification evidence adduced at the trial. Ms. Mapp was there identified as the person who paid the rent for the North Conduit Avenue premises by two witnesses.* In appellant's brief it was argued that that evidence was insufficient to establish that appellant was Mrs. Smalls, the person who signed the lease. This Court ruled this point was inconsequential and did not reach the taint point. Accordingly appellant requests reconsideration and appends herewith as Exhibit A in support thereof the argument advanced (Point V) in the court below.

In this connection appellant refers this Court to its decision in Brathwaite v. Manson, 527 F.2d 363 (2 Cir. 1975), (not available to counsel at the time of the preparation of her briefs). There is no question as to the impropriety of the identifications in this case, based as they were on suggestive

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*Only one witness positively identified her; the other said she had identified her at a previous trial but was unable to do so again.

photographic display. The evidence further shows that the showing of the photographs of Ms. Mapp to both identifying witnesses was done by Detective Bergerson. Again the reliability of his testimony on an important constitutional issue is in question. This presents merely another aspect of the unreliability of the evidence against Ms. Mapp and underlines the importance of the granting of habeas corpus relief either by reference back to the District Court for hearing or by direction of this Court.

CONCLUSION

This Court should grant appellant a rehearing and reverse the decision of the Court below.

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for Petitioner-
Appellant Dollree Mapp

March 30, 1976

EXHIBIT A

Point V from brief below

POINT V.

THE IDENTIFICATION TESTIMONY OF THE WITNESSES WEISS AND MARTIN SHOULD HAVE BEEN EXCLUDED

A. Preliminary Statement

The identifications of Mapp made by the witnesses Dorothy Weiss and Joanna Martin are objectionable both separately and collectively. As demonstrated below, Mrs. Martin's 1970 photographic identification of Ms. Mapp was made under procedures which were impermissibly suggestive. It is also contended that Dorothy Weiss' failure in 1970 to identify Mapp, under the same suggestive conditions as those under which Joanna Martin's identification was made, was a relevant exculpatory fact which Mapp had the right to vigorously explore, but which a ruling of the trial court frustrated. In the alternative, it is submitted that the witness Weiss' 1973 identification of the petitioner was tainted by her prior exposure and knowledge of Joanna Martin's 1970 identification. Finally, petitioner Mapp submits that if none of the aforesaid bases for the exclusion of the identification testimony standing alone is sufficient to require granting the writ, then those bases cumulatively require it on due process grounds.

B. The Facts Giving Rise to the Identifications

Prior to Mapp's first trial in 1971, Detective Bergersen, armed with two photographs of Ms. Mapp, visited the offices of American Homes, the construction company and managing

agents of the North Conduit Avenue apartment building in which the narcotics were alleged to have been maintained (A360, 371). At that time he showed Joanna Martin (then Joanna Fucello), as well as another woman employed in the office, two photographs of petitioner Mapp (A371-72).

According to Martin, Dorothy Weiss was not only present in the office at the time that she, Martin, made her identification of Ms. Mapp from the two photographs, but Weiss was seated in the office next to Martin in such a manner as to make it probable that she too observed the photographs of the petitioner (A465-66).

Martin identified petitioner as the Mrs. Smalls who paid the rent on apartment 2-R at 155-15 North Conduit Avenue (A165).

When asked at the hearing as to whether she could make a positive identification of Ms. Mapp, Martin responded that she could not (A184, 173). At trial she reiterated her inability to identify petitioner as anyone other than the person whom she identified during the course of the 1970 trial (A362-64). She also conceded that it was primarily the photographic image which her memory had retained (A191-92).

Dorothy Weiss testified at the hearing that she remembered Bergersen's February 1970 visit to American Homes and that she remembered talking to him (A411). She could not, however, specifically remember being shown a picture at that time (A442). However, she did remember that she and Joanna Martin

were alerted to their subsequent observation of "Mrs. Small's" arrival in a red panel truck that afternoon because of Bergersen's mention of the truck at the time he showed the pictures to them at their office (A433, 435).

Subsequent to this identification session with Martin and Weiss, it was apparently decided that only the witness Martin would be called as a witness at the first trial.

Despite the highly suggestive photograph display and her admitted inability to make anything more than an identification that Mapp was the person whom she had identified at the first trial and whom she might have identified in the photographs as being the woman known to her as Bettie Smalls, Martin was permitted to make an identification of Mapp before the jury (A756).

Also the subject of the hearing was a second visit made to the witness Weiss on January 25, 1973, following the commencement of the second trial.

Detective Bergersen testified that he showed Mrs. Weiss a series of six photographs (A365), of which the petitioner Mapp was the fifth (A366). All photographs shown were police "mug" shots (A375). Mrs. Weiss identified the photograph of Ms. Mapp (A367). This viewing took approximately twenty minutes, at which time Bergersen left. He returned, however, that afternoon in the company of ADA Robinson and Weiss was again shown the photographs. Mapp's photograph was again placed fifth in a series of six (A369).

The non-custodial photographs used to obtain the 1970 identification by Martin were never shown to the witness Weiss

in 1973 (A376). Bergersen testified that he gave Mrs. Weiss the approximate time period, late 1969 or 1970, three years prior to this showing when the person pictured in the mug shots would have come in contact with her at American Homes (A380-81). It took Weiss, he stated, only several seconds per photograph to review the six mug shots (A384).

Trial counsel unsuccessfully sought leave to call the prosecuting attorney as a witness at the hearing on Mrs. Weiss' newly-offered identification in order to determine whether (1) he had positive knowledge of any attempted out-of-court identification by the witness Weiss; (2) whether the results of that attempted identification had been exculpatory of Mapp; and (3) whether there may have been a suppression of that fact:

> If you recall, Det. Bergersen said "I remember showing the photographs to Mr. Rose. She could not make an identification. I showed it to Miss Fucello; she could. And I showed it to others in the office."
>
> It also came out that the only two others in the office was some young girl who is unknown to us and Mrs. Weiss. . .
>
> Now this Court is interested in the truth in this case. This woman was never called. And I can't see how a District Attorney prepared a case for the first trial without at least asking his team of investigators whether or not a person who was known to him to be a potential eye witness was ever asked to identify Miss Mapp. Because the Court is left here with a very strange set of circumstances that Mrs. Weiss, who had not absconded from the jurisdiction; hard working woman; lives in Queens, totally available, was never called at this first trial. We are suggesting

to the Court that she was shown photographs and that Mr. Robinson may be able to clearly shed light on whether or not his detectives in this case were ever asked to go to see her and perhaps at the same time get her identification.

Her identification could be tainted at all stages. If she at one time said she could not identify this defendant and now later does, I think the Court should have that as part of the record at an identification hearing.

And I think that Mr. Robinson's testimony may be relevant and he is not insulated by the fact that he is an attorney or a District Attorney. I have been called to the stand and I know Mr. Robinson has testified in other proceedings. There is no measure that applies to the fact that he is a District Attorney. He is a witness. We are not asking to call him at this point at the trial proper. This is out of the hearing of the jurors. This is just before the Court on a legal issue, and I think Mr. Robinson should be permitted to take the stand.

THE COURT: Want to say anything further?

MR. ROBINSON: Only what I said before. I'm not obliged to explain how or why I prepared my other case, just as not the second.

MR. ASNESS: I will not ask him about his mental processes; I will ask him about things that he did and said to particular officers.

THE COURT: Denied.
(A452-53)

C. The Identifications Should have been Excluded

It is clear that where pre-trial identification procedures are unnecessarily suggestive or conducive to erroneous identification, the prosecution must show by clear and convincing evidence that the in-court identification is not affected by an improper pre-trial procedure. LaValle v. Delle Rose, 410 U.S. 690 (1973).

The Supreme Court has held that due process is violated by an identification procedure when it is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968). The required inquiry is two-pronged: first, whether the identification procedure was impermissibly suggestive; and second, if so, whether under the totality of the circumstances it has such a tendency to give rise to a substantial likelihood of irreparable misidentification that to allow the witness to make an in-court identification would violate due process. United States ex rel Bisordi v. La Vallee, 461 F.2d 1020, 1023 (2d Cir. 1972); United States ex rel. Phipps v. Follette, 428 F.2d 912, 914-915 (2d Cir.), cert denied, 400 U.S. 908 (1970).

In the instant case it is submitted that the showing to the witness Martin of only two photographs, both of Mapp, and their probable display to Dorothy Weiss, was impermissibly and unnecessarily suggestive. United States ex rel. Gonzalez v. Zelker, 477 F.2d 797, 801 (2d Cir. 1973); United States ex rel. John v. Cassoles, 489 F.2d 20, 24 (2d Cir. 1973).

In addition, Joanna Martin stated both at the hearing on her identification (A173) and at trial (A362) that she could not be sure that Mapp was the "Mrs. Smalls" who had made the rental payments to her (A363).

While this Court is bound to give considerable weight to the findings of the judge who saw and heard the witness,

United States ex rel. Phipps v. Follette, supra, at 915, because of the necessary suggestion in the showing of only two photographs of petitioner this Court "must find a basis for identification[s] of [petitioner] at trial. . . independent of any suggestion to that effect in the photos." United States ex rel. John v. Casscles, 489 F.2d at 25, n. 5; also see, United States v. Culotta, 413 F.2d 1343, 1347 (2d Cir. 1969).

Further, as to the identification made in 1973 by Dorothy Weiss, it follows that if photographs had been shown to her in 1970 in the highly-suggestive setting heretofore described and even then she failed to identify Ms. Mapp, it was error (1) to reapproach her in 1973 and display petitioner's mug shot to her, see Foster v. California, 394 U.S. 440, 443 (1969); and (2) it was also error not to permit petitioner to adduce the circumstances of the 1970 identification failure by allowing her to call the prosecutor, the only witness who could have concretely related the circumstances surrounding the abortive 1970 identification attempt by Weiss and the subsequent decision not to use her as a witness at the first trial. See, United States ex rel. Whitmore v. Malcolm, 476 F.2d 373 (2d Cir. 1973 (en banc) vacating, 476 F.2d 363.*

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* In Whitmore, which involved prosecutorial suppression of exculpatory eyewitness identification testimony, following the Second Circuit's vote to rehear en banc the panel opinion, and with the rehearing en banc pending before the court, the People dismissed the case against Whitmore, thus mooting the appeal. The en banc vacating of the panel's opinion was later construed as "effective in the administration of individual justice." Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1021, n. 2 (2d Cir. 1973) (Oakes, J., dissenting), cert granted, U.S. (1973).

In Foster, supra, the witness failed to identify Foster the first time he confronted him, despite a suggestive lineup. The police then arranged a showup at which the witness could make only a tentative identification. At a third confrontation the witness made a definite identification. The Supreme Court held all the identifications inadmissible, observing that the third identification was "all but inevitable." 394 U.S. at 443. No less can be said here for Weiss' identification, prompted as it was by the overseeing of Joanna Martin's equally tainted observation, "the statement by the investigating officer"* regarding the use of a red panel truck by Mapp, the observation of petitioner via a "mug shot" and the subtle confirmation that Ms. Mapp was "the one" engendered by Bergersen's 1973 visit at a time when Weiss knew that Martin had identified petitioner.

These combined faults underlying Weiss' identification, coupled with the trial court's refusal to allow the prosecutor to be called, should have compelled its exclusion.

Put another way, since the Court must seek to determine whether there was already such a definite image of the petitioner in the witnesses' minds before the suggestions arising from the unlawful identification procedures could take effect upon their powers of recall, Mapp should have been permitted to call ADA Robinson so that she could refute the People's

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* United States v. Sanders, 479 F.2d 1193, 1197 (D.C. Cir. 1973).

necessarily implied claim that such a definite image existed. If Weiss had failed to make an identification in a highly suggestive setting, Mapp had the right under Brady v. Maryland, 373 U.S. 83 (1963) to knowledge of that fact and the trial court's failure to allow her to adduce that evidence through the mouth of the witness who best knew the facts was error. See, United States ex rel. Rutherford v. Deegan, 406 F.2d 217 (2d Cir. 1969); United States v. Casscles, 489 F.2d at 26, supra.

Furthermore, counsel was erroneously prohibited from inquiring into the source of the photographs shown Ms. Martin. She had testified that two pictures, one black and white and one in color were shown to her by Bergersen (A182-3) some time in February. It was the defense contention that "we believe that photograph was taken out of Miss Mapp's house on the execution of the warrants February 18th and therefore could not have been a picture shown to Mrs. Martin on the 9th of February" (A193). The court, however, refused to permit exploration into the issue, thus precluding a finding that the identification was also tainted by the use of evidence derived from an unlawful search. See, United States v. Edmons, 432 F.2d 577 (2d Cir. 1970). By the same token, the defense was not allowed to explore the possibility that paragraph D of Bergersen's affidavit was untrue in that he actually showed Mrs. Martin photographs after execution of the warrant, rather than before applying for the warrant.

D. Due Process Compels Reversal

Mapp also submits that the sum total of the identification problems in this case requires reversal under the totality of the circumstances. Foster v. California, supra, at 442 (citing cases); United States ex rel. Cannon v. Montayne, 486 F.2d 263 (2d Cir. 1973); United States ex rel. Rivera v. McKendrick, 448 F.2d 30 (2d Cir. 1971); United States v. Fitzpatrick, 437 F.2d 19, 23-5 (2d Cir. 1970).

Here, the People's witness lost one of the photographs used to secure the February 1970 identification (A140); the circumstances surrounding the People's acquisition of that photograph -- possibly as a result of a constitutional violation -- is unclear (A140); the reasons why Weiss' February 1970 identification, or lack thereof, were not divulged before is still unclear. The People's witnesses admitted that it never occurred to them to use a lineup even though, as to Weiss, a post-indictment identification was involved (A374). Martin admitted her in-court identification before the jury was imprecise. These factors, coupled with the absolute invalidity of Martin's identification of Mapp, should require reversal under the Due Process Clause. Neil v. Biggers, 419 U.S. 188 (1972); Eisen v. Carlisle & Jacquelin, supra, at 1021, n. 2; Foster v. California, supra.

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

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INSTITUTION FOR WOMEN, BEDFORD HILLS,
NEW YORK, et al.,
Respondents-Appellees. ~~Defendant~~

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 101 West 80th St.
New York, N.Y. 10024

That on March 30, *19* 76 *deponent served the annexed*
Petition for Rehearing

on Hon. Louis J. Lefkowitz, Attorney General, State of New York,
attorney(s) for Respondents-Appellees
in this action at 2 World Trade Center, New York, N.Y. 10047 *the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*

Sworn to before me

March 30, 1976

George Cohen
GEORGE COHEN
Notary Public, State of New
No. 31-0582100
Qualified in New York County
Commission Expires March 30, 1977

August De Fonse
The name signed must be printed beneath
AUGUST DE FONSE

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on 19 deponent served the annexed

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney(s) Law